Liew Fook Chuan v Menteri Sumber Manusia & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-25-135 OF 1990
ABU MANSOR J
14 SEPTEMBER 1994

Administrative Law *— Judicial review — Certiorari and mandamus — Minister of Human Resources' order of non-referral — Decision not to refer employment dispute to Industrial Court — Relevant considerations in exercising discretion — Restriction of defendant's ability to present case — Whether to quash Minister's decision*

Labour Law *— Employment — Dismissal — Referral of dispute to Industrial Court — Whether Minister of Human Resources fully considered facts of case in exercising discretion*

The applicant commenced employment with the Hong Leong Group in Malaysia ('the company') in 1977, and had since worked in various subsidiary companies within the group with distinguished performance, turning around subsidiary companies which were a losing concern into profitable ventures. In recognition of his distinguished management abilities, he was twice awarded the Hong Leong Group Chairman's Award for management excellence. Nevertheless, in February 1990, in spite of the tribute paid to the applicant by the company, the applicant was charged with: (i) entering into negotiations for the sale and purchase of certain land without informing his employer that his brother had an interest in the transaction as broker; and (ii) engaging in the business of Asia-Pacific Advisory Group Sdn Bhd and Finnova Corp Sdn Bhd without obtaining the prior approval of the board of directors, thus breaching the terms and conditions of his employment. The applicant was dismissed after an inquiry was held by the company. The applicant then filed an application to the Minister of Human Resources to be reinstated under s 20 of the Industrial Relations Act 1967, on the grounds, inter alia, that: (i) the charges had been framed by a managing director after his attempts at inducing the applicant to resign failed; (ii) he only had a nominal share in Asia-Pacific Advisory Group Sdn Bhd; (iii) he did not receive any salary as an honorary adviser in the Finnova Corp sdn Bhd as it was a family concern. However, the applicant's appplication was refused. The applicant applied to the High Court for a certiorari to quashed the minister's decision. He contended that the minister had failed to consider all relevant facts in the circumstances of the case.

Held, allowing the application:

(1) Anything that restricted, or appeared to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and thereby make a case susceptible to judicial review.

The question of whether there was such a breach must be solved by examining the facts upon which the minister expressed himself as satisfied that it was not expedient for him to refer the trade dispute to the Industrial Court.

(2) In the circumstances, it was possible that the managing director had framed the charges of alleged misconduct justifying the applicant's dismissal for the reasons alleged by the plaintiff. Had the minister considered fully this case, he would have come to a different conclusion than he had.

[Bahasa Malaysia summary

Pemohon telah mula bekerja dengan kumpulan Hong Leong di Malaysia ('syarikat tersebut') dalam tahun 1977. Selepas itu, dia telah bekerja dengan beberapa syarikat subsidiari dalam kumpulan tersebut dengan pencapaian yang cermelang, dengan menukarkan syarikat subsidiari yang mengalami kerugian kepada perniagaan yang menguntungkan. Sebagai pengakuan kebolehan pengurusannya yang cermelang itu, dia telah dianugerahkan dengan Award Pengerusi Hong Leong untuk pengurusan cemerlang sebanyak dua kali. Walau bagaimanapun, dalam Februari 1990, tanpa mengira penghormatan yang telah diberikan oleh pemohon kepada majikannya, dia telah dipertuduhkan dengan: (i) mengadakan rundingan untuk menjual beli hartanah tanpa memberitahu syarikat tersebut bahawa adik lelakinya mempunyai kepentingan dalam urusniaga tersebut sebagai broker; dan (ii) menceburkan diri dalam perniagaan Asia-Pacific Advisory Sdn Bhd dan Finnova Corp Sdn Bhd tanpa mendapatkan kebenaran bertulis terlebih dahulu daripada badan pengurus, lalu telah memungkiri terma dan syarat penggajiannya. Pemohon dipecat selepas suatu siasatan diadakan oleh syarikat tersebut. Pemohon kemudiannya telah memfailkan suatu permohonan pegembalian semula di bawah s 20 Akta Perhubungan Perusahaan 1967, atas alasan, antara lain, bahawa: (i) pertuduhan tersebut telah diada-adakan oleh pengarah urusan selepas percubaannya untuk menyebabkan pemohon untuk meletakkan jawatan gagal; (ii) dia hanya memegang syer nominal di Asia-Pacific Advisory Sdn Bhd; (iii) dia tidak menerima sebarang gaji sebagai seorang penasihat kehormat Finnova Corp Sdn Bhd, kerana ia merupakan suatu syarikat keluarga. Dia berhujah bahawa menteri sumber manusia telah gagal mempertimbangkan kesemua fakta yang relevan dan pengataannya bahawa dia telah dijadikan mangsa oleh pengarah urusan.

Diputuskan, membenarkan permohonan itu:

(1) Apa-apa yang menyekat, atau kelihatan menyekat, kebolehan defendan untuk menyampaikan kesnya boleh diputuskan sebagai suatu kemungkiran keadilan prosedur. Maka, kes yang berkenaan akan menjadi mudah terkena kajian semula kehakiman. Soalan sama ada terdapat kemungkiran yang sedemikian harus diselesaikan dengan mengkaji fakta yang mana menteri

menyatakan bahawa dia berpuas hati adalah tidak wajar untuknya merujukkan pertikaian itu kepada Mahkamah Perusahaan.

(2) Dalam keadaan ini, adalah mungkin bahawa pengarah urusan telah mengada-adakan pertuduhan salah laku yang dinyatakan itu untuk menjustifikasikan pemecatan pemohon atas sebab yang dinyatakan oleh plaintif. Jika menteri telah mempertimbangkan kes ini dengan sepenuhnya, dia harus mencapai suatu keputusan yang berlainan daripada yang telah dibuat olehnya.]

Notes

For cases on dismissal of employee, see 8 *Mallal's Digest* (4th Ed) paras 512–523; [1989] Mallal's Digest 949; [1991] Mallal's Digest 1272–1274; [1992] Mallal's Digest 1151–1152; [1994] Mallal's Digest 1512.

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–233, 349–372.

Cases referred to

Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal [1991] 1 MLJ 24 (folld)

Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20, 26(2)

V Kanagalingam (*VK Lingam & Co*) for the applicant.
Lee Chan Leong (Federal Counsel) for the first respondent.
N Sivabalah (*Shearn Delamore & Co*) for the second respondent.

Abu Mansor J: In the notice of motion (enclosure 13), the applicant prays for orders as follows:

(1) An order of certiorari to be moved into this honourable court for the purpose of it being quashed the order of non-reference of the dismissal of the applicant to the industrial court made by the first respondent on the 13 November 1990 and for an order of mandamus for the purpose of ordering the first respondent to refer the dismissal of the applicant to the industrial court for an award on the grounds set out in the copy of statement served herewith used on the application for leave to apply for an order of certiorari and an order of mandamus. And that the costs of and incidental to this application may be paid by the respondents.

(2) That on the hearing of this motion the applicants will use the affidavit of En Liew Fook Chuan affirmed on the 21 December 1990, and the exhibits therein referred to.

(3) That the honourable Mr Justice Yang Arif Dato' Haji Eusoff bin Chin by order dated 16 January 1992 directed that all proceedings be stayed pending the determination of this motion.

This application of the applicant is supported by his affidavit in p 20 of P1 where he states:

> I commenced employment with the Hong Leong Group in Malaysia on 1 July 1977, as the general manager of Malaysia United Paper Product which is a subsidiary of the Hong Leong Group. In 1979, I was transferred as the general manager of Hong Leong Yamaha Motors and Hong Leong Yamaha Distributors. Subsequently I was appointed director/general manager of Hong Leong Yamaha Distributor Sdn Bhd. In 1987, I was made general manager of Hong Leong Equipment Sdn Bhd.

In para 3, he said during his career with the Hong Leong Group he had turned around subsidiary companies which were losing concerns into profitable ventures. When he was the general manager of Hong Leong Yamaha Motors and Hong Leong Yamaha Distributors, not only was he instrumental in securing the Yamaha Franchise for the Hong Leong Group but he also built the business such that within four years of its commencement, Yamaha had captured 43% of the market share and had become the number one seller in Malaysia for the first time. This won, according to him, the appreciation of the president of the Yamaha Motor Co Ltd of Japan, and he enclosed herewith a copy of the letter of appreciation dated 31 January 1987, from the president of the Yamaha Motor Co Ltd which is marked as exh LFC1.

In para 4 of his affidavit, he stated that in addition to this, in recognition of his distinguished management abilities, he was awarded twice the Hong Leong Group Chairman's Award for management excellence for the fiscal year 1980/81 and 1984/85. This is the most sought after award in the Hong Leong Group as it carries a cash prize of RM100,000 each. In his case on both occasions, the cash money awarded to him was RM100,000 each. He enclosed herewith a copy of the Chairman's Award letter from the Chairman of Hong Leong Group dated 9 November 1985, which is exhibited as LFC2.

But, on the 22 February 1990, in spite of the glowing tribute paid to the applicant by the respondent employer, he was charged as per exh LFC9, and on that charge, he was subsequently found guilty and he was dismissed. The charge read as follows:

> (1) That in the transaction for the sale and purchase of the land held under state lease 4249 Lot No 27, Section 20, Petaling Jaya ('the land') between Kee Huat Radio ('the vendor') and Hong Leong Industries Bhd ('the purchaser'), you had entered into negotiations with Mr Teo Chiang Kok, the agent ('the agent') of the registered owner of the land, without informing your superior(s) of your brother's interest as broker for the transaction and obtaining their prior approval for your undertaking and continuation of your negotiation, notwithstanding your brother's said interest. In so doing you had put yourself in a position where your personal interest would or might conflict with the interest of the Hong Leong Industries Group without the prior knowledge and consent of your superior(s). This is in breach of your duties and responsibilities and the implied terms and conditions of your employment.

(2) That you had engaged and/or concerned yourself and/or had an interest in the business of Asia-Pacific Advisory Group Sdn Bhd without obtaining the prior written approval of the board of directors of Hong Leong Equipment Sdn Bhd or the board of directors of Hong Leong Management Co Sdn Bhd. This is in breach of your terms and conditions of employment set out in item 4(a)(iii) of section B1 of the Hong Leong Group manual on personnel regulations and policies.

(3) That you had engaged and/or concerned yourself and/or had an interest in the business of Finnova Corp Sdn Bhd without obtaining the prior written approval of the board of directors of Hong Leong Equipment Sdn Bhd or the board of directors of Hong Leong Management Co Sdn Bhd. This is in breach of your terms and conditions of employment set out in item 4(a)(ii) of section B1 of the Hong Leong Group manual on personnel regulations and policies.

Of these charges, counsel for the applicant submitted that in respect of the first charge, which was that of conflict of interests, there was a gap of less than seven years from the alleged happening of the event and the date of the letter 16 January 1990. In respect of the second charge, the applicant is charged as having an interest in Asia-Pacific Advisory Group, and in the third charge, he is alleged to have been concerned in the business of company Finnova Corp Sdn Bhd without a proper written approval of the board of directors of Hong Leong Equipment Sdn Bhd.

As has been stated at the end of the inquiry, the applicant was dismissed and his services was terminated. After this inquiry, the applicant filed an application to be reinstated under s 20 of the Industrial Relations Act 1967. It is also to be noted that at p 43 of P1, there is a written report made by the applicant to the Director General for Industrial Relations in the course of reconciliation, the report being requested by the Director General for Industrial Relations. In the course of reconciliation, the reconciliation officer asked the applicant for report, hence it was put up by the applicant.

At p 43 of the report, the applicant mentioned his relationship with the new managing director of the company employing him, by the name of Roger Tan. He said he had differences with Roger Tan way back in 1983/1984 when he was then managing director of Hong Leong Properties. The disagreement was because the applicant insisted that the construction of Wisma Hong Leong should be open to tender, and not by private negotiation with one contractor only. As a result of his insistence, tenders were invited for the construction of the main building. During the tender exercise, the contractor doing the foundation failed to secure the tender on a price with a difference of RM1m. The applicant later found out that the RM1m difference was equivalent to the price of this same contractor's house, which was sold to Roger Tan during this period. In his report, he further said that when Roger Tan became his managing director, it was an opportunity for him to force the applicant out of the group.

In 1987, he transferred the applicant from a big, profitable and successful company to a small, languishing company, Hong Leong Equipment. He was demoted from the position of director/general manager

of Hong Leong Yamaha Distributor to general manager of Hong Leong Equipment. When he transferred the applicant to this company, he and everyone else had expected the applicant to resign. Instead of resigning, the applicant embarked on a rescue course to prove to all, that he had the capability to turn sick companies around. This company had losses of RM2.5m and RM1.1m for the two preceding years. The applicant, however, managed to make the Equipment company profitable.

The applicant further stated to the best of his recollection, since joining Hong Leong 13 years before that, he had never failed to live up to his objective of making money for the company. His commitment to the Hong Leong Group was proven by his successful track record. Even in Hong Leong Equipment, he continued to make profit though it was obvious that he no longer had a future in the Group.

It would seem that by his continued success he spoiled his adversary's plans to make conditions so unbearable that he would leave of his own accord. Having failed to get that result, his managing director conjured a plan to manoeuvre Hong Leong Management to fabricate these ridiculous charges against him to put him in bad light so as to necessitate his dismissal. The above was his reply to the three charges during the domestic inquiry.

The applicant states in respect of the first charge, which allegation took place in 1983 and was brought out only in 1990. This was because there was a suit in the Sessions Court Kuala Lumpur brought by one of the broker's wife there against the owners of the land, Kee Huat Sdn Bhd. This is to be found in the notes of proceedings exh AM1, head of the Director General for Industrial Relations' affidavit, from pp 68–96. Here, the applicant was called as the witness for the defendant, Kee Huat Radio. It was a fact that the land that was sold belonged to Kee Huat Radio. The applicant's employer Hong Leong bought this land in 1983. The applicant's brother Liew Chin Chuan brought to the attention of the applicant the existence of the land for sale, and the applicant conducted negotiations for the purchase of this land that was bought with the approval of Hong Leong Management. Building had been constructed on it, and it then appreciated in value. The applicant's brother was a licensed land broker and he received commission from the owner of the land, not from Hong Leong, the buyer.

As regards the second charge, the record of the domestic inquiry is at pp 130–141, where the applicant is alleged to have been engaged in or concerned himself as having interest in the business of Asia-Pacific Advisory Group without obtaining the prior written approval of the board of directors of Hong Leong Equipment Sdn Bhd. He was asked whether he pleaded guilty or not. His answer was, because his interest in the company was only a RM1-share which was not significant he, therefore, did not inform Hong Leong Equipment. He denied he had engaged in the business of the company; he had no working interest but had only a share of RM1, which he admitted. It was true he had no written approval from his employer.

In respect of the third charge, the applicant did not admit that he was engaged or concerned himself or had an interest in the business of Finnova Corp Sdn Bhd without obtaining the prior written approval of the board of directors of Hong Leong Equipment Sdn Bhd or the board of directors of Hong Leong Management Sdn Bhd, and therefore he denied he was in breach of the terms and conditions of his employment set-up in item 4(a)(ii) of Section B1 of Hong Leong rules' manual on personal regulations and policies. A B

The applicant stated that he neither had a share in the above company, nor was he a director, but at p 176 of the search report on the Asia-Pacific Advisory Group Sdn Bhd, it is plain that the company was incorporated on the 16 March 1984, and the two subscriber shares on the 14 October 1989 states that the applicant became the director of Asia-Pacific, and that his wife was also a director. The reason why the applicant was involved in the company, he said, was to give moral support to his wife and he did not give working hours to this company. C

Counsel for the applicant drew the court's attention to p 120 of P1, wherein it was given the terms and conditions of employment for executives. Para 4(a)(ii) was relevant to the second and third charges where the applicant was alleged to have concerned himself in any business. The applicant in reply stated that the regulation was dated 1 January 1981, whereas in para 3 of the applicant's affidavit at p 193, the applicant stated that he commenced working with the Hong Leong Group on 1 July 1977, and he was therefore subject to another set of terms and conditions, and that these conditions never contained this clause that he was not to be concerned in any business rather than that of his company. Counsel said he was therefore bound by another set of conditions but not the terms and conditions of employment dated 1 January 1981. D E F

The applicant's affidavit affirmed on the 31 March 1994 stated (at p 195, para 6) that there were defects in the domestic inquiry. Briefly, he alleged that witnesses were not called to the effect that Hong Leong had also paid RM25,000 to Don Enterprise, another broker, who never dealt in the subject land, as it was the applicant's brother who was the one who introduced the land. G

The applicant also alleged in his affidavit that the finding of the domestic inquiry was perverse and unintelligible, and no reason was given for arriving at that finding. He also stated, at p 140, that the domestic inquiry never analysed the evidence given and never gave reason as to how they arrived at the finding. Counsel submitted that the domestic inquiry proceeded on the basis that it was the duty of the applicant to exonerate himself, whereas the onus of proving misconduct by the employee is on the employer. H

The minister's affidavit is at p 49, where he stated that he did not see it fit to refer the matter to the Industrial Court. In para 4 he said 'tidak bermanafaat'. The minister also said that he had considered Roger Tan's factor ('telah mempertimbangkan segala fakta-fakta'). I

A The applicant, referred the court to the leading case of *Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal* [1991] 1 MLJ 24 at p 2 of P2. In that case, it was held by [Jemuri Serjan SCJ] that the discretion conferred on the minister under s 26(2) of the Act, without any express limitation placed upon him in the Act, does not give the minister a subjective power. The idea of a subjective power B was rejected by the court, as the courts have developed a broad doctrine of ultra vires whereby the exercise of wide, discretionary powers may be reviewed. His Lordship then asked, 'what then, is the power of the courts? They can only interfere with an act of executive authority if it can be shown that the authority has contravened the law'.

C His Lordship went further to hold that it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted, the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles, the discretion, in His Lordship's opinion, is an absolute one and cannot be D questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in E exercising the discretion, it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act makes it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

To sum it up the counsel for the applicant submitted that:

F (a) the minister never considered at all the things related to sale of land that took place in 1981;

(b) the minister nowhere stated that reg 4 (a)(iii) of the regulations of Hong Leong Group taking effect on 1 January 1981 does not apply to the applicant;

G If these things in the said grounds are not sustained, he submitted the entire dismissal of the applicant is null and void. Then:

(c) the minister never considered at all the distinguished career of the applicant in Hong Leong Group, to have received twice Chairman's H Award; and

(d) the minister never considered that the applicant was only lending moral support to his wife in Asia-Pacific and was holding one share as director and in the Finnova he was only honorary adviser and he did not receive any salary as it was a family concern.

I The minister also failed to consider and give sufficient weight to the allegation on the applicant that he was being victimized by the managing director, Roger Tan. The applicant's counsel also said that after a

distinguished career, this dismissal was a stigma on the applicant and he prayed that he be given a chance to vindicate himself to the Industrial Court. He further submitted that it made no difference that the domestic inquiry had been set up, because the industrial court is a court of good conscience which will vindicate the applicant of these charges.

Having heard both parties I consider whether I should allow this application of the applicant. In this, I apply the judgment of Edgar Joseph Jr J (as he then was) in *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 at p 493, which said:

> It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review.

I also apply the case of *Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal* [1991] 1 MLJ 24 at p 29, where Jemuri Serjan SCJ said:

> In our view this question must be solved *aliunde* by examining the facts upon which the minister expressed himself as satisfied that it was not expedient for him to refer the trade dispute to the Industrial Court. It is therefore convenient to look at the facts of this case.

When I examined the facts of this case and the affidavits filed therein, especially that of affidavit of the applicant, it may well be true, as he said, that Roger Tan having failed to secure his eviction from the employment of Hong Leong by the aforesaid demotion then proceeded to frame three charges of alleged misconduct justifying the applicant's dismissal from his 12 years of outstanding service to that of Hong Leong Group.

After having considered this case carefully, I am of the view that had the minister considered fully this case, he would have come to a different conclusion than he had and I allow this application in terms and the motion prayed for with costs.

Application allowed.

Reported by Angela Ho